Supreme Court, U.S.
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No. 81-2398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NANCY D. PERKINS,

Petitioner,

v.

CATERPILLAR TRACTOR CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF OF CATERPILLAR TRACTOR CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit erred in reversing the district court's decision as clearly erroneous because a review of each individual finding left the appellate court "with the definite and firm conviction that a mistake [was] committed."

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Respondent Caterpillar Tractor Co.[1] respectfully urges that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reprinted as Exhibit A in the Appendix to the Petition for Writ of Certiorari.[2] The opinion of the United States District Court for the Central District of Illinois is reprinted as Exhibit C in that Appendix. Neither opinion is officially reported.

[1] Pursuant to Rule 28.1 of the Rules of this Court, Respondent states that it has no parent company, subsidiary (except wholly-owned subsidiaries) or affiliates.

[2] References to the Petition and Appendix will be designated "(P. ____)" and "(A. ____)", respectively.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This action involves Rule 52(a), Fed. R. Civ. P., which is reprinted as Exhibit D in the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner Nancy D. Perkins brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that Respondent Caterpillar Tractor Co. had discriminated against her because of her sex or because of a charge she had filed with the Equal Employment Opportunity Commission ("EEOC") prior to her employment.

The district court found that Petitioner, who was employed by Respondent from March 21, 1975 to July 7, 1976, had been unlawfully discharged. In its decision, the court inferred an "overt discriminatory motive" from the fact that Petitioner had been hired pursuant to a voluntary, EEOC-approved conciliation agreement (A. 98). The conciliation agreement had been admitted in evidence over Respondent's objection (A. 55). Further, the court based its decision on its review of the personnel files of Petitioner and twenty-two (22) male employees, and the testimony of witnesses at trial.

The Court of Appeals for the Seventh Circuit reversed. The Court held that, as Petitioner had failed to present a *prima facie* case of discrimination, the district court erred when it refused to grant Respondent's motion to dismiss at the close of Petitioner's case (A. 83). While the Court recognized that the district court's reliance on the conciliation agreement was both an error of law and an error of fact (A. 53), it nonetheless reviewed the entire record under the "clearly erroneous" standard set forth in Rule 52(a), Fed. R. Civ. P. The Court said:

> Whether or not the refusal of the trial court to grant the motion [to dismiss] is to be reviewed under the "clearly erroneous" rule (Fed. R. Civ. P. (52)), we are 'left with the definite and firm conviction that a mistake has been committed' (*United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) and that the motion should have been granted.

(A. 12).

The Seventh Circuit's decision to reverse rested, in part, on the district court's erroneous reliance on the conciliation agreement. As noted, the Seventh Circuit held such reliance to constitute both an error of law and, "on the evidence for plaintiff, an error of fact." (A. 53).

Additionally, the Seventh Circuit held the district court's purely factual findings erroneous. For the convenience of this Court, some of the Seventh Circuit's observations in this regard are summarized below:

> — there was "no evidence" that Petitioner was discharged from a job for which she was "qualified" (A. 47);
>
> — while the district court stated that Petitioner's supervisors all testified they had knowledge she had been hired pursuant to a conciliation agreement, "[the Court of Appeals was] unable to find any such testimony" (A. 57);
>
> — there was "no evidence" that any alleged sexual advances to Petitioner, if they occurred, "had anything to do with her discharge" (A. 62);
>
> — although the district court found that "[Petitioner] was accutely aware that her submission [to sexual advances] was required for advancement," there was no evidence in the record supporting this statement, even in Petitioner's own testimony (A. 63);
>
> — there was "no evidence" that Petitioner was the only female in her work area, as the district court "supposed" (A. 72);
>
> — there was "no evidence" of discrimination contained in the personnel files of male employees, because none of those employees were similarly situated to Petitioner (A. 74);
>
> — although the district court found Petitioner was the only employee discharged without first being

> suspended, at least twelve (12) males were discharged without "antecedent" suspensions and, therefore, "the premise on which the district court acted was thus without any support in the evidence" (A. 79).

REASON FOR DENYING THE WRIT: THE SEVENTH CIRCUIT PROPERLY APPLIED THE CLEARLY ERRONEOUS TEST

The Petition states that this Court should review this case because "the decision below has so far departed from Fed. Rule Civ. P. 52(a) as to call for an exercise of the Court's power of supervision" (P. 10). Even a cursory review of the Seventh Circuit's decision, however, readily reveals that the Court properly applied the "clearly erroneous" test in reversing the district court's decision. Indeed, the Court reviewed the district court's entire decision under that test, notwithstanding the question of law involving the conciliation agreement and the mixed question of law and fact regarding the lower court's application of the standards a Title VII plaintiff must meet to satisfy his/her *prima facie* burden. While the existence of those questions would have justified a less stringent standard of review, the Court of Appeals apparently perceived no need to avail itself of that option. *See, e.g., Pullman-Standard v. Swint*, ___ U.S. ___, 102 S. Ct. 1781, 1789, 1790 n.19 (1982) ("*Swint*").

In *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), this Court defined a "clearly erroneous" finding as follows:

> A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Id. at 395. The Seventh Circuit, very early in its opinion, made clear this was the standard it was applying (A. 12).

In a case decided during this very Term, this Court carefully explained the proper application of the "clearly erroneous" test to a finding of discrimination. *Swint, supra.* There, this Court held that findings of discriminatory intent, with respect to the operation of seniority systems, must be reviewed under the "clearly erroneous" standard. In so doing, this Court reversed the Fifth Circuit's decision that findings of discriminatory intent constitute "ultimate facts" which are freely reviewable. *Id.* at 1788. Further, this Court held that the Fifth Circuit erred when it failed to focus on the evidentiary basis for any particular finding, but instead reviewed the record as a whole and reached an independent conclusion. *Id.* at 1791.

Here, consistent with this Court's decision in *Swint,* the Seventh Circuit reviewed the district court's individual findings of fact, and explained, in detail, why each was erroneous. Notably, the Court below never mentioned the term "ultimate fact," nor did it purport to apply anything other than the "clearly erroneous" standard of review.

Simply stated, all the Seventh Circuit did was reverse a "clearly erroneous" lower court decision, following a review of the evidentiary basis for each individual finding leading to that decision. As this Court has succinctly stated, in language particularly applicable here:

> [T]here is great value in appellate courts showing deference to the fact-finding of local trial judges. . . . The clearly-erroneous standard serves that purpose well. But under that standard, the role and duty of the Court of Appeals are clear: it must determine whether the trial court's findings are clearly erroneous, sustain them if they are not, but set them aside if they are. The Court of Appeals performed its unavoidable duty in this case and concluded that the District Court had erred.

Dayton Board of Education v. Brinkman, 443 U.S. 526, 534 n.8 (1979).

Thus, contrary to Petitioner's assertions, there plainly is no need for the exercise of this Court's power of supervision in this case, because the Seventh Circuit simply performed its "unavoidable duty" in reversing the erroneous decision of the district court.

CONCLUSION

Since the Seventh Circuit properly applied the "clearly erroneous" test in reversing the district court's decision in this case, the Petition for Writ of Certiorari should be denied. Denial of the Petition is especially warranted because, during this very Term, in *Swint,* this Court addressed the proper application of the "clearly erroneous" test to cases involving allegations of discrimination, and the Seventh Circuit's decision herein was fully consistent with the mandate of *Swint.*

Respectfully submitted,

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